STATE OF MICHIGAN

COURT OF APPEALS

TRAVELERS INDEMNITY CO,

Plaintiff-Appellant,

v

KUHLMAN CORP, KUHLMAN ELECTRIC CORP, BORG-WARNER INC, TC GROUP LLC d/b/a THE CARLYLE GROUP a/k/a CARLYLE GROUP LP,

Defendants-Appellees.

and

HARTFORD ACCIDENT & INDEMNITY CO, COMMERCE & INDUSTRY INSURANCE CO, FEDERAL INSURANCE CO,

Interested Parties.

UNPUBLISHED
May 16, 2006

No. 265786
Oakland Circuit Court
LC No. 2005-065206-CZ

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting defendants' motions to dismiss on the basis of fourm non conveniens. We affirm.

I. Basic Facts and Proceedings

Kuhlman Electric Company incorporated in Michigan in 1915, and changed its name to Kuhlman Corporation (Old Kuhlman) in 1967. In 1991, Old Kuhlman moved its principal place of business from Michigan to Kentucky. In 1993, Old Kuhlman organized two new entities, Kuhlman Electric Company (KEC), a Delaware corporation with its principal place of business in Versailles, Kentucky, and Kuhlman Corporation (New Kuhlman), a Delaware corporation with its principal place of business in Maumee, Ohio. Old Kuhlman allegedly merged itself into KEC, which was held by parent New Kuhlman.

In 1999, Borg-Warner, a Delaware corporation with its principal place of business in Oakland County, Michigan, acquired KEC and New Kuhlman. Later that same year, Borg-Warner and New Kuhlman sold KEC to KEC Acquisition Company, a Delaware corporation, which is owned by an affiliate of TC Group d/b/a The Carlyle Group, believed to be a Delaware corporation.

Plaintiff issued at least seven insurance polices to Old Kuhlman, including six General Liability Policies covering years 1970 through 1977, and one Excess Indemnity/Umbrella Policy covering year 1991 to 1992. Interested parties, Hartford Accident and Indemnity Company, Commerce and Industry Insurance Company and Federal Insurance Company, issued insurance polices to defendants covering later years.

In April 2001, PCB and other contaminates were discovered at defendant KEC's facility in Spring Hills, Mississippi. In July 2003, several Mississippi residents filed an action against Old Kuhlman, New Kuhlman, KEC and Borg-Warner in Mississippi state court, claiming environmental harm as far back as the 1950s (Mississippi action). KEC asked plaintiff to defend the Mississippi action on March 26, 2004. Because plaintiff did not contribute to the defense, KEC, on February 18, 2005, filed a motion to authorize a third party complaint in the Mississippi action to implead plaintiff and other insurers, including interested parties.

On March 23, 2005, plaintiff filed the instant complaint, alleging that "one or more of the [d]efendants have requested insurance coverage from [plaintiff]" to defend and indemnify against claims they polluted five sites in four states; two in Michigan, and one in Mississippi, North Carolina and California. Plaintiff received the requests for the two Michigan sites on June 3, 1997 and April 6, 1998, the California site on October 27, 1997, and the North Carolina site on February 28, 2005. The complaint primarily sought a declaratory judgment to determine the extent of its liabilities for each of the sites.

While the instant case was pending, the Mississippi court accepted defendants' third-party complaint on July 8, 2005. Defendants then filed a motion to dismiss the instant case on the basis on forum non conveniens, which the trial court granted.

II. Standard of Review

This Court properly reviews the trial court's decision to grant a motion to dismiss on the basis of forum non conveniens for an abuse of discretion. *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999). "An abuse of discretion is found only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id*.

III. Analysis

On appeal, plaintiff argues the trial court erred in dismissing this case on the basis of forum non conveniens because defendants failed to show that plaintiff's forum choice was inconvenient. We disagree.

"The principle of forum non conveniens establishes the right of a court to resist imposition on its jurisdiction although such jurisdiction could properly be invoked." *Cray v*

General Motors Corp, 389 Mich 382, 395; 207 NW2d 393 (1973). The doctrine of forum non conveniens "presupposes that there are at least two possible choices of forum." *Id*. The parties here agree that Michigan and Mississippi are two legitimate forum choices. Indeed, at the time of the trial court's ruling, September 15, 2005, a Mississippi district court had accepted defendants' third-party complaint against plaintiff and other insurers, named in the case as interested parties. In making the discretionary decision to dismiss on the basis of forum non conveniens, courts should engage in "[a] balancing out and weighing of factors to be considered in rejecting or accepting jurisdiction," including:

> 1. The private interest of the litigant.
>
> a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
>
> b. Ease of access to sources of proof;
>
> c. Distance from the situs of the accident or incident which gave rise to the litigation;
>
> d. Enforcibility of any judgment obtained;
>
> e. Possible harassment of either party; f. Other practical problems which contribute to the ease, expense and expedition of the trial; g. Possibility of viewing the premises.
>
> 2. Matters of public interest.
>
> a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
>
> b. Consideration of the state law which must govern the case;
>
> c. People who are concerned by the proceeding.
>
> 3. Reasonable promptness in raising the plea of Forum non conveniens. [*Cray, supra* at 395-396.]

There is also no claim that defendants failed to promptly plead the issue of forum non conveniens. Thus, the inquiry turns only on the private interests of the litigants and matters of public interest.

We cannot conclude that the trial court abused its discretion in granting defendants' motion to dismiss on the basis of forum non conveniens. The trial court only specifically addressed sub factor (1)(a), the availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses. The trial court stated that "*most* [of the key witnesses] reside out of [Michigan] . . . and of the people that actually reside in Michigan, only a *few* reside in Oakland County." (Emphasis added). On appeal, plaintiff again claims that "*many* of the key witnesses in this case actually reside outside Mississippi, and *many* of them reside in Michigan." (Emphasis added.) Plaintiff's contention on appeal that *many* key

witnesses may reside in Michigan does not undermine the trial court's determination that *most* key witnesses reside outside Michigan. Thus, plaintiff's contention is rejected as unpersuasive. Further, plaintiff fails to address whether the potential Michigan resident witnesses would be unwilling to attend proceedings in Mississippi or that deposition testimony of these witnesses would impede trial.

The trial court did, however, conclude that the motion to dismiss based on forum non conveniens was proper based on its findings that "the issue arises in Mississippi," "there is nothing more convenient about [Michigan] as opposed to Mississippi," and Mississippi is where "the only real underlying case exists." In sum, the trial court accepted defendants' position that the instant case only implicated the Mississippi site, and it rejected plaintiff's position that the instant case implicated every site.

In support of this determination, the trial court clearly relied on defendants' withdrawal of their demand that plaintiff defend and indemnify them, which states:

> Please be advised that with respect to all environmental matters arising in Michigan, North Carolina and California, that are identified in the Complaint, Defendant hereby withdraws their demand that Travelers defend and indemnify them for these claims. The Defendants reserve the right to reinstate their demand for a defense and indemnity if the nature of the claims at any of these sites materially changes, or investigation reveals that the alleged damage is materially greater than presently known.

The above letter renders a present determination of plaintiff's liability for the Michigan, North Carolina and California sites unnecessary. While plaintiff is correct that the letter does not completely relieve plaintiff of all liability in regard to the Michigan, North Carolina and California sites, the trial court cannot issue a declaratory judgment addressing plaintiff's future unknown liabilities in regard to these sites.

Turning to the remaining sub factors, we conclude that the private interests of the litigants favor a Mississippi forum. Plaintiff attempts to characterize the instant action as simply a contract action. However, it is well-settled that:

> [S]ince a court asked to render a declaratory judgment on whether an insured's conduct is covered under a liability policy must determine disputed issues of fact which form the basis for the insured's liability in the underlying tort action, the existence of a bona fide controversy over whether an insured's conduct alleged in the underlying tort case is negligent of intentional renders premature a declaratory action to determine liability coverage until the controversy is resolved in the underlying case. [16 Couch on Insurance 3d § 232.67.]

In its complaint, plaintiff claims that "some or all of the Underlying Environmental Matters may be limited or precluded on the grounds that follow:" Plaintiff then submits numerous paragraphs of potential exemptions and limitations based on policy definitions such as "accident," "occurrence," "bodily injury," "property damage," "insured," "payable as damages," "suit," "other insurance," and concepts such as mitigation of damages and set-offs. While a Michigan court may readily determine the plain meaning of the language contained in an insurance policy,

that court must also, for instance, apply the term "accident," "from the standpoint of the insured, not the injured party," while considering that "the appropriate focus of the term 'accident' must be on both 'the injury-causing act or event and its relation to the resulting property damage or personal injury." *Allstate Ins Co v McCarn*, 466 Mich 277, 282; 645 NW2d 20 (2002). Here, to determine the extent of plaintiff's obligations under the polices, the court must reference the facts of the underlying Mississippi action.

Accordingly, evidence from the underlying Mississippi action is relevant to the coverage determination and therefore favors the Mississippi forum. Further, plaintiff and defendants are currently parties to the Mississippi action. Requiring defendants to also litigate the matter in Michigan only subjects them, and not plaintiff, to possible harassment and additional expense. The clear advantage of the Mississippi forum is that it can resolve the underlying case and the liabilities of each of the potential insurers as third-party defendants. And although, as the trial court noted, viewing the premises is unlikely in an insurance action, the only location that may plausibly be viewed is the Mississippi site.[1]

We further conclude that matters of public interest, overall, do not favor a Michigan forum. There is no particular showing of administrative difficulties present in Michigan or Mississippi. However, as noted, there are potential administrative advantages to the Mississippi action in that it can more efficiently resolve the entire underlying case and the liabilities of each of the potential insurers.

The closest question in the instant case is whether sub factor (2)(b) favors a Michigan or Mississippi forum. However, we note that sub factor (2)(b) is merely one of many sub factors used to decide a motion for forum non conveniens. At one time, "[t]he predominant view in Michigan [was] that a contract is to be construed according to the law of the place where the contract was entered into." *Chrysler Corp v Skyline Indus Services, Inc*, 448 Mich 113, 223; 528 NW2d 698 (1995). However, in *Chrysler*, our Supreme Court held "the rigid 'law of the place of contracting' approach has become outmoded in resolving contract conflicts. Rather, §§ 187 and 188 of the [Restatement (Second) Conflicts of Law], with their emphasis on examining the relevant contacts and policies of the interested states, provide a sound basis for moving beyond formalism to an approach more in line with modern-day contracting realities." *Id*. at 124.

Under the Second Restatement, the case still presents a close question. On one hand, § 188, entitled, "Law Governing In Absence Of Effective Choice By The Parties" appears to favor application of Michigan law.[2] It provides that:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

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[1] Sub factor (1)(d) "[e]nforcibility of any judgment obtained," is not addressed by the parties, and plaintiff maintains it does not affect the instant determination.

[2] There is no claim that § 187, entitled, "Law Of The State Chosen By The Parties," is applicable.

> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> > (a) the place of contracting,
> >
> > (b) the place of negotiation of the contract,
> >
> > (c) the place of performance,
> >
> > (d) the location of the subject matter of the contract, and
> >
> > (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Factors (a), (b), (e), and arguably (c) and (e) favor application of Michigan law. Only factor (d) favors application of Mississippi law. However, a more specific provision under Second Restatement, § 193, entitled "Contracts Of Fire, Surety Or *Casualty* Insurance" (emphasis added), appears to favor a Mississippi forum. It provides that:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Given that the insured property is located in Mississippi, § 193 appears to favor a Mississippi forum.

We conclude that there is no clear answer whether Michigan or Mississippi law must govern the case. However, even accepting the conclusion that Michigan law controls the case, for purposes of a forum non conveniens analysis, we do not assign significant weight to this one sub factor.

Last, we conclude that sub factor (2)(c), people who are concerned by the proceeding, favors a Mississippi forum. Contrary to plaintiff's argument, this case does not merely limited to the parties' intent when entering into contract. Rather, as earlier mentioned, courts must apply the language of the insurance polices to the facts underlying the Mississippi action to determine whether coverage exists. Thus, Mississippi residents are more concerned by the proceeding in

that much of the underlying action involves harm to persons and property located in Mississippi. Overall, matters of public interest favor a Mississippi forum.

We affirm.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Brian K. Zahra